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In the Orphans' Court,

For the City and County of Philadelphia.

Estate of THOS. McCREDY, deceased.

AUDITOR'S REPORT AND EXCEPTIONS.

WILL OF BERNARD MCCREDY, DEC'D.

King & Baird, Printers, 607 Sansom Street, Philadelphia.

In the Orphans' Court for the City and County of Philadelphia.

ESTATE OF THOMAS McCREDY, DECEASED.

To the Honorable, the Judges of the Orphans' Court for the City and County of Philadelphia.

The Auditor appointed "to report distribution of the balance of the proceeds of sale of the real estate of the said decedent at Norristown which has been paid into Court."—[see certificate of appointment annexed, marked "Exhibit (A.)"],

Respectfully Reports,

That he gave due notice of his appointment and of the time and place of meeting, in compliance with the rule of this Court, by advertisements made twice successively in "The Legal Intelligencer" and five times every other day, in "The Philadelphia Inquirer," a daily newspaper published in the city of Philadelphia,—[copies of which advertisements are hereto annexed and marked respectively "Exhibit (B.)," and "Exhibit (C.)"]; and having been duly qualified, as will be seen by reference to the annexed "Exhibit (D.)," he met the parties in interest at the time and place fixed in the advertisements, and upon subsequent occasions, and proceeded in the discharge of the duties of his appointment.

The Auditor was attended at these meetings, or some of them, by CONSTANT GUILLOU and JOHN B. CHAPRON, Esqs., of counsel with Mrs. Dolores Emma McCredy, Augustus Wilson and Samuel H. Carpenter, Executors and Trustees named in the will of Thomas McCredy, deceased; by PETER MCCALL, Esq., Attorney for Morris Meredith, Administrator of Gertrude G. Meredith, deceased, and for Mrs. Emeline M. Ewing; by WILLIAM F. JUDSON, Esq., Attorney for "The Pennsylvania Company for Insurances on Lives and Granting Annuities," Guardians of Anna T. Meredith and William M. Meredith, minors; by JAMES BOYD and A. B. LONGAKER, Esqs, Attorneys for "The Bank of Montgomery County;" and by MORRIS MEREDITH, Esq., in person.

Considerable testimony, both oral and documentary, was produced and submitted to the Auditor. The material facts thus proved he now proceeds to state, in order to the intelligent decision of the matters in issue before him.

Thomas McCredy, the present decedent, was the son of Bernard McCredy, who were, during the latter part of the life of the latter and at time of his death, engaged in the business of the manufacture of cotton goods, under the firm name of "Bernard McCredy & Son." Their operations were carried on at two cotton mills, both of which were owned by Bernard McCredy. One of these, known as the "Rockdale" property, is situated in Delaware County, in this State, near the town of Chester and upon a creek of the same name; and consisted of about seventy-five acres of land, upon which are erected two large mills or factories with the necessary machinery driven by a valuable water power, a mansion house and about thirty dwellings for the operatives. The other is upon the river Schuylkill, in the Borough of Norristown, Montgomery county, in this State; and consists of twelve acres of land, on which are erected a large stone cotton mill or factory, with the necessary machinery driven by a fine water power, a machine shop and sixty-eight tenements for the operatives.

The Rockdale property was purchased by Bernard McCredy in 1845, for $27,500, subject to a Mortgage of $10,000 which still remains upon it. He subsequently made improvements upon this estate which cost from $15,000 to $20,000. About two years prior to his death he asked $75,000 for the property, and he evidently set too high an estimate upon its value. Competent witnesses stated before the Auditor, that it was not worth more than from $40,000 to $50,000, and this testimony was uncontradicted. The taxes upon it are about $300 per year; and the annual premiums for the necessary insurances $500 a year, in addition to the interest, upon the premium on a perpetual policy of $10,000 which accompanies the mortgage heretofore mentioned.

In 1856 the Executors of Thomas McCredy leased the two properties together for $19,000 *per annum* for six years from June 23d, 1856, with a provision, that if the Rockdale property should from any casualty be destroyed the rent should be abated $6,000. This latter property is now leased by the same Executors to tenants for ten years commencing May 1st, 1861, at the annual rent of $4000.

Bernard McCredy died siezed of these two pieces of real estate, and of no other, on the 29th day of November 1854, leaving a will dated the 13th day of May 1854, which was duly admitted to probate and letters testamentary thereon were granted by the Register of wills of this city to Thomas McCredy, the sole Executor therein named, on the 4th day of December 1854. A certified copy of this will was produced before the Auditor and a copy of the same is hereto annexed marked "Exhibit (E.)." After directions as to the payment of his debts and certain provisions for his daughters and their children, which will be the subject of notice hereafter, the Testator devised and bequeathed the residue of his estate, real, personal and mixed, to his son Thomas McCredy, his heirs and assigns.

Bernard McCredy left no widow, one son, Thomas McCredy, and two daughters, viz.: Mrs. Emeline M. Ewing,

and Mrs. Anna Meredith, who died on the 1st day of September, 1857, leaving three children, viz.: Anna S. Meredith and William M. Meredith, both of whom survive, are minors, and of whom "The Pennsylvania Company for Insurances on Lives and Granting Annuities" are the Guardians appointed by this Court, and Gertrude G. Meredith, who died intestate, in her minority, unmarried and without issue, on the 22d day of October, 1861, and upon whose estate Letters of Administration have been duly granted by the Register of this City to her father, Morris Meredith, Esq.

Thomas McCredy, being his father's sole Executor and partner in business at the time of his death, and also his residuary Legatee and Devisee, took possession of all of his estate, real and personal, paid his debts which amounted to $25,000 and also, while he lived, paid the Annuities bequeathed by his father's will to his two sisters. In October, 1855, he filed an account as Executor of Bernard McCredy, in which he charged himself with personal assets amounting to $24,978.62 and claimed credit to the amount of $6,536.87. Of this latter sum $4.000 were in payment of the two annuities to his sisters—Mrs. Meredith being paid in full to February 29th, 1856, and Mrs. Ewing to August 29th, 1855. This account was referred to an auditor by this Court, who gave due notice of his appointment by advertisements as required by the rule of this Court and whose report was confirmed absolutely on the 7th day of March, 1856. No one appeared before this auditor except the accountant and his counsel. The report states that the account was properly vouched—briefly recites the provisions of Bernard McCredy's will and concludes thus—"The "auditor awards and distributes, therefore, to the said "Executor in compliance with the terms of the said will "the sum of $18,814.94 the balance in his hands."

Thomas McCredy died seized of the said two pieces of real estate and of no other, on the day of May, 1856, leaving a will dated the 20th day of January, 1855, which was

duly admitted to probate and Letters testamentary thereon were granted by the Register of Wills of this city, on the 2d and 24th days of June, 1856, to Mrs. Dolores Emma McCredy, Samuel H. Carpenter and Augustus Wilson the Executors therein named. A certified copy of this will was in evidence before your Auditor. It is unnecessary to recite in detail its provisions. The Testator directs his debts to be paid, bequeaths a few trifling legacies and gives all the residue of his personal estate to his wife absolutely. He then devises *all of his real estate* to Samuel H. Carpenter and Augustus Wilson upon certain trusts which need not here be specified. He then provides—"I authorize "and empower my Executors hereinafter named and the "survivors and survivor of them, whenever it may be con- "sidered expedient or best for the interests of my estate, "to sell or dispose of all or any part of my real estate to "such person or persons, at such time or times, either at "public or private sale, and upon such terms and conditions, "as in their, his or her judgment may be considered most "beneficial and proper; and upon such sale or sales to sign, "seal, execute, acknowledge, perfect and deliver all such "deed or deeds, conveyances or assurances in the law as "shall or may be requisite or necessary to vest and assure "the said premises or any part thereof in the purchaser or "purchasers thereof in absolute fee simple, freed and dis- "charged of and from all and every the trusts and limita- "tions herein set forth and declared, and without any liabil- "ity on the part of the purchasers or purchaser as to the "application, misapplication or non application of the pur- "chase money. And the moneys arising from such sale or "sales to invest in such manner as the said executors or the "survivors or survivor of them may in their, his or her judg- "ment deem most advantageous to my estate and to hold all "such investments to and for the same and like uses, intents "purposes and limitations as are herein above set forth and "declared of and concerning my real estate and to and for "no other use, intent or purpose whatsoever."

The Trustees under the will have taken charge of the real estate above described and have managed it with a degree of prudence, skill and care which deserve commendation. Since the death of their Testator from August, 29th, 1856, to February 28th, 1863, they have paid to Mrs. Anna Meredith and her children, or their representatives, $13,500, and a similar sum to Mrs. Emeline M. Ewing on account of their respective Annuities of $2,000 under the will of Bernard McCredy, and in full to the last mentioned date.

Since June, 1861, the Norristown property has been untenanted, although the Trustees have made diligent but unavailing efforts to procure a tenant. Of course, it has yielded during this period no income and has been a constant expense.

The Executors of Thomas McCredy, in pursuance of certain orders and decrees of the Orphans' Court for Montgomery County, executed two mortgages upon the Norristown estate, both to Robert Ewing, the one dated October 24th, 1856, recorded same day in the proper office at Norristown in Montgomery County, in Mortgage Book No. 41, page 124, for $15,000; and the other dated the 15th day of December, 1857, and recorded in same office in Mortgage Book No. 41, page 394, for $25,000 payable in instalments, all of which have matured. Both of these mortgages were executed by the direction of the Court last named after due notice to all parties in interest; and the money raised upon them was used in the repayment of funds which had been advanced for the liquidation of the debts of Bernard and Thomas McCredy, including those of Bernard McCredy to which allusion has already been made in this Report as having been paid by Thomas McCredy. It is not necessary further to explain this somewhat complicated matter, as it was agreed by all the parties before the Auditor, that the balances due on these two mortgages should be paid in full out of the proceeds of the sale of the Norristown property.

Failing to secure a tenant for the Norristown factory

after diligent and persevering efforts made in this State, in New York and in the Eastern States, the Executors, under the ample powers given them in the will of Thomas McCredy above recited, exposed the whole of the Norristown property to sale at public auction in this City, on the 17th day of March, 1863, and sold the same to George Callaghan and Robert Callaghan for the sum of $95,400. Upon the 20th day of March, 1863, these purchasers applied to the Court by petition for leave to pay the whole of the purchase money into Court under the provisions of the Act of 24th February, 1834, sec. 19, (Purdon's Digest, page 290, pl. 111.) A rule was thereupon granted upon all the parties in interest returnable the 3d day of April, 1863, to show cause why the prayer of the petition should not be granted. Notice of this rule was duly served on all the parties in interest except the minor children of Mrs. Emeline M. Ewing, who had no guardian; and most of the parties appeared on the return day of the rule by their Counsel, when the Court made the rule absolute.

Subsequently the Executors delivered to the purchasers the deed for the premises: and the whole of the purchase money, $95,400, was paid into Court.

On April 3d, 1863, the Court directed the payment of $1654 to the Counsel for the Executors to meet the necessary expenses of the sale; and on April 17th, 1863, further directed the payment of the sum of $15,887 50 to "The Delaware Mutual Safety Insurance Company" in full payment of the first of the two mortgages herein before mentioned—it being the first lien upon the premises; and on the same day a similar order was made for the payment of the sum of $11,191.84 to "The Bank of Montgomery County," the holders of the second mortgage herein before mentioned, on account of the same. These payments were made on April 18th 1863.

The residue of the purchase money amounts to $66,666.-66; and it is of this your Auditor is directed to report distribution.

The only Claimants who appeared before the Auditor were the following, viz.:

I. "The Bank of Montgomery County," who by their Attorneys, Messrs. Boyd and Longaker, claimed the balance due upon the mortgage just mentioned, viz.: $4,501.48 with interest thereon from April 18th, 1863.

It was conceded that this mortgage is the first record lien upon the premises sold, now unpaid, and there was no objection raised to the payment of the balance due. The Auditor therefore, allows this claim in full.

II. Messrs. Chapron and Guillou, on behalf of the Executors of Thomas McCredy, asked that they should be allowed commissions upon the purchase money, for their services in making the sale.

This claim is a just and reasonable one. The fidelity and prudence of these Executors in the general management of the estate has already been made the subject of remark.—And their efforts to sell the real estate, and their success in this behalf, ought to receive a proper compensation. In view of all the circumstances, the Auditor is of opinion that one and a-half per cent. on the whole amount of the sale is but a fair remuneration for their services. He, therefore, awards to them the sum of $1431.

III. Mr. McCall, on behalf of Morris Meredith the Administrator of Gertrude G. Meredith, deceased, claimed that the sum of $33,333 33$\frac{1}{3}$, was, by the will of Bernard McCredy deceased, charged npon the real estate sold to secure the Annuity of Mrs. Anna Meredith, and upon her death the principal became payable in equal parts to her three children, one of whom was the said Gertrude G. Meredith, who having afterwards, and before the sale, died, her Administrator was entitled to $11,111 11$\frac{1}{9}$ and the interest thereon unpaid.

IV. Mr. Judson, on behalf of "The Pennsylvania Company for Insurances on Lives and Granting Annuities,"

Guardians of Anna S. and William M. Meredith, the other two children of Mrs. Meredith, made a similar claim and upon like ground, for the sum of $22,222 22$\frac{2}{9}$ and the interest due thereon.

V. Messrs. Chapron and Guillou, on behalf of Augustus Wilson and Samuel H. Carpenter, claimed that the whole of the residue of the fund, after the payment of the expenses of the Audit, the Executors' commissions and the balance due upon the mortgage held by "The Bank of Montgomery County," should be awarded to their clients as Trustees of the real estate of Thomas McCredy under his will, to be disposed of in accordance with the provisions thereof.

Mr. McCall appeared as Attorney for Mrs. Emeline M. Ewing; but made no claim upon the fund upon her behalf, on the ground, that, although the Annuity given to her by the will of Bernard McCredy was a charge upon the premises sold, yet it was a continuing lien which was not affected by the sale.

The children of Mrs. Ewing, viz.: John Davis Ewing, Sarah Davis Ewing, Bernard Ewing and Mary Ewing, are all minors, are without any guardian, and were not represented before the Auditor. Mr. McCall asked, that if the Auditor and Court should be of opinion that this annuity and legacy was discharged, that the sum of $33,333.33$\frac{1}{3}$ should be impounded and placed in trust as an auxiliary fund to Rockdale.

The distribution to be made of this fund depends upon the interpretation to be given to the will of Bernard McCredy.

The Testator first directs his debts and funeral expenses to be paid by his Executor.

Second. He gives to his daughter Anna Meredith "two thousand dollars to be paid to her annually in equal quar-

terly payments by my executor," during her natural life, for her sole and separate use.

Third. He gives to his daughter Emeline Martha Ewing, a like sum, in precisely the same words.

Fourth. He says "in order more effectually to secure the "preceding legacies, I hereby charge upon my real estate "situate in the county of Delaware, and State of Pennsyl- "vania, the sum of $33,333.33\frac{1}{3}$, the interest thereof being "the said sum of $2000 to be paid to my said daughter "Anna," annually, in equal quarterly payments; and upon her death, he gives the principal sum to her children in equal parts.

Fifth. He uses precisely the same words as in the fourth clause as to Mrs. Ewing and her children.

Sixth. In case either of his daughters should die leaving no children or descendants of children, he gives the principal to his son Thomas McCredy and his heirs.

Seventh. The will proceeds "After the payment of my "just debts and securing the payment of the sums aforesaid "annually to my said daughters, and the principal hereby "given to their children and their descendants upon their "death, as to the rest and residue of my estate, real, per- "sonal and mixed, and wheresoever the same may be situ- "ate, I give, devise and bequeath the same to Thomas "McCredy his heirs and assigns."

Lastly. Thomas McCredy is appointed sole executor.

Messrs. McCall and Judson claimed, that the Testator charged the two annuities given to Mrs. Meredith and Mrs. Ewing and also the legacies bequeathed to their children respectively upon *all* of his real estate; and that the only distinction to be drawn between the two pieces of real estate of which the Testator died seized, was, that the Rockdale Estate was merely pointed out as the one to be first applied

in payment of the annuities and legacies, upon a deficiency of personal estate.

Messrs. Guillou and Chapron contended that these Annuities and Legacies were charged upon the Delaware County property *alone*; and that the Norristown property was not liable for their payment in any event: but they agreed, that if they were charged upon the Norristown estate, either primarily or secondarily, they ought, if discharged by the sale, to be paid out of the present fund.

Messrs. McCall and Judson examined one of the subscribing witnesses to the Will of Bernard McCredy, to show what the Testator declared at the time the will was executed, was his intention in his will as to making all of his real estate liable to the payment of the annuities and legacies therein given to his daughters and their children.

But the Law seems well settled, that parol evidence cannot be adduced either to contradict, add to or explain the contents of a Will, where there is neither *latent* nor *patent* ambiguity, of which there is neither in this will. The will must be judged *ex visceribus suis,* (1 Jarman on Wills, 349*; Duncan *v.* Duncan, 2 Yeates 302; Guy *v.* Sharpe 1 Mylne & K. 589; Toll *v.* Hardy, 6 Cowan 333; Iddings *v.* Iddings, 7 S. & R. 111; Lewis *v.* Lewis, 2 W. & S. 458; Asay *v.* Hoover 5 Barr, 21.)

And when either of these ambiguities exists, all that is allowed is proof of the circumstances surrounding the testator when he executed his will, so that the Court may be in his place, and, from a knowledge of his relations to persons and things around him at the time, judge what he intended by the written words he used as expressive of his intentions, (1 Jarman on Wills, 363*; Dewitt *v.* Yates, 10 Johns. Rep. 156, Marshall's Appeal, 2 Barr, 388, Stover's Appeal, 2 Barr, 428; Brownfield *v.* Brownfield, 2 Jones, 146.) Such evidence as this the Auditor received and has embodied in the foregoing narrative of facts.

What the Testator may have declared at the time he signed and published his will is not proper for our consideration in the present inquiry.

Liens upon lands, whether created by deed or will, are not favored in Law, and must be created in *express terms or by plain implication*. (1 Roper on Legacies, 670* Note 1; Montgomery *vs.* McElroy, 3 W. & S. 370; Hepburn *vs.* Snyder, 3 Barr, 78; Hagadorn's Appeal, 1 Jones, 88; Brandt's Appeal, 8 Watts, 198.) In the interpretation of wills, however, repeated decisions have settled, that it does not require *express words* to make a legacy a charge upon lands. If the intention to charge is a plain implication from the whole will, then the land is liable. (Ripple *vs.* Ripple, 1 Rawle, 386, and see authorities just cited.)

With these leading principles in view, let us pass to the questions to be determined under Bernard McCredy's will. Did he intend to charge the Annuities and Legacies given to his two daughters and their children, upon *all* of his real estate, or only upon the Rockdale property?

He first gives separate Annuities of $2,000 each, in distinct clauses, to his two daughters, to be paid by his Executor. Then, in distinct clauses, "in order more effectually to secure the preceding legacies," he charges upon the Rockdale estate $33,333 33⅓ as a principal, and directs the interest thereof "being the *said* sum of $2,000" to be paid to his daughters during life; and upon their death the principal to be divided among their children, and in default of children to go to Thomas McCredy. And finally, "*after* the payment of my just debts and securing the *payment* of the" annuities and legacies, he gives and devises the rest and residue of his estate, real, personal and mixed, to his son Thomas McCredy in fee, and appoints him sole Executor.

Apart from all authority, it seems clear to your Auditor, that the Testator intended that his daughters and their children should surely be provided for; and that his son

should have no part of his estate until his debts were paid and the *payment* of the annuities and legacies was secured. It is what is left of his entire estate *after* the *payment* of these is *actually made* or *secured* which the son is to take.

The whole estate is the security for the payment of the debts and legacies. These being paid or secured the son is to have the residue.

When the Testator used the word "*secured*" in this final clause, did he mean to require no more to be done than what he had already accomplished in the 4th and 5th items of the will, wherein he expressly charges the legacies and annuities upon a particular piece of real estate "in order more effectually to secure them?" If so, then this statement that their *payment was to be first secured* was wholly useless.

The Testator appears to have first determined to give the annuities, directing their payment by his Executor, who was to be his son and the chief object of his bounty. Then, in order more effectually to secure these, the principal is charged upon the Delaware county property, and "the interest thereof being the said sum of $2000" is to be paid to his daughters as before directed. And finally, fearing that his personal estate and the real estate specifically charged might prove to be insufficient *security*, he provides, that *after* the debts are paid and these annuities and legacies are *secured* to be paid, his son shall have the residue. Indeed, had the clauses making the *principal* sums charges upon "Rockdale" (for it is to be noted that the *annuities* are not expressly made charges) been omitted, there would have been no room for doubt but that *all* of the real estate was charged with the payment of the annuities and legacies.

It is the well-established rule of interpretation of wills, that where legacies are given, and in the residuary clause the real and personal estate are blended together, all of the real estate passing under the residue, on a deficiency of personal estate, is charged with the payment of the legacies. (2 Jarman on Wills, 533*, 534*; 1 Roper on Legacies,

675*; Hassell *vs.* Hassell, 2 Dick. 526; Bench *vs.* Biles, 4 Madd. 187; Tucker *vs.* Hassanclever, 5 Binn. 525; Nicholas *vs.* Postlethwaite, 2 Dall. 131; Witman *vs.* Notman, 6 Binn. 395; Shelby *vs.* Com'th, 13 S. & R. 354; McClenachan *vs.* Wyant, 1 Penn'a R. 111; 2 Penn'a R. 279; Marcy's Est. 10 Harris, 143; McGlaughlin *vs.* McGlaughlin, 12 Harris, 22; McCracken's Est. 5 Casey, 426; Field's Est. 7 Casey, 12.) In this will the real and personal estate are blended in the residuary clause. It is the "rest and residue of his estate, *real, personal and mixed*"—viewed or blended as a common fund for the payment of his debts and securing the payment of the annuities and legacies—*left after* these objects have been accomplished which is given to his son.

There was a class of cases cited where the Courts have held, that a direction to a devisee of land to pay a particular legacy does not create a lien upon the land devised, but merely a personal liability upon the acceptance of the devise by the devisee. (Hagadorn's Appeal, 1 Jones, 88; Wright's Appeal, 2 Jones, 256; Dewitt *vs.* Eldred, 4 Watts, 414; Montgomery *vs.* McElroy, 3 W. & S. 370; Brandt's Appeal, 8 Watts, 198; Loback's Appeal, 6 Watts, 169; Wiltenberger *vs.* Schlegel, 7 Barr, 241.) These cases decide, that, in order to create a charge upon the land devised there must be something in the will to show an intention that the legacy is to be paid by the devisee *out of the land*, as in Hoover *vs.* Hoover, 5 Barr, 351; Ripple *vs.* Ripple, 1 Rawle, 389; Shaffer's Appeal, 8 Barr, 38. Where the devisee is the residuary devisee and legatee this intention is shown by the fact that it is *only* the residue, after all the other bequests of the will have been satisfied, which he is to take. But this class of cases does not affect the present. Here there is no direction to the devisee, *quâ* devisee, to pay the annuities and legacies. The *Executor* is directed to pay. It is nowhere in the will intimated that out of the Rockdale estate these are to be paid. Rockdale is only charged as a

more "*effectual security*"—"a mere auxiliary fund" as is said by Lewis, Ch. J., in Welch's Appeal, 4 Casey, 366.

Another well-established rule is not to be overlooked. Where the *Executor* is devisee of real estate, a direction to *him* to pay debts or legacies casts them upon the realty so devised. (2 Jarman, *525.) "This has always been held sufficient to charge the real estate." (2 Jarman, *533.) (See also, Aubrey *vs.* Middleton, 2 Eq. Ca. Abr. 479, pl. 16; Vin. Abr. Charge (D,) pl. 15; Alcock *vs.* Sparhawk, 2 Vern. 228; 1 Eq. Ca. Abr. 198; Barker *vs.* Duke of Devonshire, 3 Mer. 310; Hennel *vs.* Whitaker, 3 Russ. 343; Dover *vs.* Gregory, 9 Law Jour. (N. S.) 89; Hagadorn's Appeal, 1 Jones, 90.) In the will before us, each of the annuities is "to be paid to her annually in equal quarterly payments *by my executor*," and Thomas McCredy is the sole executor and sole devisee of *all* of the land. It is true, that in the clauses in which the principal sums are charged on Rockdale, it is not said by whom the quarterly payments of the annual interest to the daughters and the principal to their children were to be made; but the beginning of each of these clauses and their whole tenor shew, that the testator looked upon the annuities to his daughters and the legacies to their children as *one*—"the interest thereof being the said sum of $2,000." This rule would, therefore, at all events render the land liable for the annuities, however it might be as to the legacies to the children.

It was earnestly argued by the able Counsel for the Trustees, that the Testator having *expressly* charged one piece of real estate with the payment of the annuities and legacies, he thereby showed his intention to *limit* the charge to this alone. In other words the annuities and legacies are *specific* and *not demonstrative* legacies. They are to be paid out of this real estate upon which they are charged, and *not* out of the other real estate or the personalty, *in any event.*

The authority mainly relied upon in support of this position was Walls *vs.* Stewart, 4 Harris, 275. In that case a farm was devised, subject to and charged with the

payment of a legacy which was in the same clause of the will bequeathed to be paid to certain legatees. The testator sold the farm in his lifetime; and the Court held that the legacies were *specific* and not *demonstrative* and were adeemed. There was no gift of the legacies save in the clause of the will making them a charge; nor were they directly or indirectly mentioned, or referred to in any other part of the will.

The learned Judge who delivered the opinion of the Court (Bell, J.) clearly points out the distinctions between the two kinds of legacies. *Demonstrative* are general legacies referred to a particular fund for payment *only* as pointing out *a convenient mode of payment*. *Specific* are where the gift is of a particular fund, in whole or in part, or so charged upon the object made subject to it as to show an intention to burden that object *alone* with the payment. "If it be manifest there was a fixed and independent intent "to give the legacy separate and distinct from the property "designated as the source of payment, the legacy will be "deemed general or demonstrative, though accompanied by "a direction to pay it out of a particular estate or fund "specially named." (Page 282.)

The principles recognized in these definitions, and especially in this last quoted sentence, decide the character of these annuities and legacies. We first have in Bernard McCredy's will the *distinct* gift of the annuities, which are directed to be paid by the *executor*, to whom the personal estate usually goes, and to whom in this will it is expressly given. Then a particular piece of real estate is pointed out and charged, *not in terms* as the *only* source of payment of the annuities and legacies, but on the contrary *merely* as a *more effectual* security for the principal and the interest forming the annuities. Then in the sixth clause is a distinct bequest of the *principal* of the annuities in the event of either of the daughters dying without issue. And finally a direction, that before the only other legatee and devisee of the testator shall have anything whatever, these very

annuities and legacies are to be—not merely *secured* (as by the former clauses of the will they had been) on a particular piece of real estate which might prove to be very inadequate security and never ripen into *payment;* but their *payment* is to be secured.

It is submitted that the intent is manifest upon this will to give these annuities and legacies independently, separately and distinctly from the property designated as the source, *not of payment,* but *only* of "*security.*" There is no direction here as in Cryder's Appeal (1 Jones, 72), that specific lands shall be sold and out of the proceeds the annuities and legacies shall be paid. Rockdale is only charged with them the "more effectually to secure them."

Nor are these legacies like those in Balliet's Appeal (2 Harris, 461) in which case the Court most clearly shew, that in his will the Testator intended to *charge* the real estate with, and to *discharge* the personal estate from, the payment of the legacies in question (citing 2 Will. on Ex. 1050; 1 Mer. 220, 230); and also that "the real and personal estate are kept separate and distinct." "It is not the case of two funds blended in one." And although there was a residuary clause it had reference to the *personal* estate only (453).

In *Walls* vs. *Stewart* (supra) Mr. Justice Bell extracts from the authorities, which he fully quotes and comments upon, another rule in regard to demonstrative and specific legacies. "Wherever an intent is exhibted to make distribution of "the *value* of lands, either by means of a sale and division "of proceeds, or by the charge of a sum *in numero*, payable "by the devisee of the land as a *quasi* partial purchase of the "estate devised, the bequests are specific," (p. 284 and see also 1 Roper on Leg. 670*). In Bernard McCredy's will there is no distribution of the value of Rockdale; nor any direction that the *devisee,* as such, (as in 2 Jarman on Wills, 593*) should pay *out* of Rockdale the annuities and legacies; but, on the contrary, their payment is directed to be made by the *Executor,* and Rockdale is only charged as a more effec-

tual security "in aid of the personal estate," as said by Lord Hardwicke in Amesbury *vs.* Brown, 1 Vez. Sr. 481.

These principles and rules are fully sustained by the text books and decided cases. (1 Roper on Leg. 192*, 197*, 218*. Coxe *vs.* Bassett, 3 Vez. Jr. 155; Elson *vs.* Airy, 2 Vez. Sr. 568; Man *vs.* Copeland, 2 Madd. 223; Lupton *vs.* Lupton, 2 John Ch. Rep. 614, 624; Graves *vs.* Graves, 8 Simons 43.)

The case of Willox *vs.* Rhodes (2 Russ. 452) is very similar to the present. The testator gave £500 to *A.* for life and after her death to her children; and added, I *guarantee* my Great Guilford Street leaseholds for the payment of the above. Sir John Leach (V. C.) and Lord Eldon (C.) held the legacies to be *demonstrative* and not specific. The real estate, although charged, was mere security, or in aid of the personalty. There is also a line of cases supporting the rule laid down in 1 Roper on Legacies, 219*. "If there "be nothing expressive of the testator's intention except "what arises from a mere bequest of moneys or annuities "*out* of his stock, the legacy will *not* be specific." (See cases there cited. Will. on Ex. 1005). In Tompkins *vs.* Tompkins (Prec. in Ch. 397) the testator bequeathed legacies to his daughter "to be paid out of his stock." He then devised the rents of his real estate to his wife for life for the support of his children and raising and making up the portion of his daughters, and then added, "*after* my debts "and legacies paid, I give my lands and tenements and "hereditaments to my son C. and his heirs." The Court held that the legacies were charged upon the land in aid of the personalty, notwithstanding the specific charges of the same upon the stocks and rents.

Welch's Appeal (4 Casey 363) is also very decisive upon the present case. The bequest was of a sum of money to be paid by the devisee of specific land out of the profits of the land. The Court held it to be a demonstrative legacy, saying: "The real estate charged is merely an auxiliary

"fund provided to secure its payment." "It is payable out "of the general assets if the auxiliary fund fails."

McLoughlin *vs.* McLoughlin (30 Barb. N. Y. Rep. 458) was a case where certain annuities and legacies were charged upon a particular piece of real estate, and yet they were held to be chargeable upon *all* of the real estate.

Many other cases might be cited to the same effect. The reading of the will contended for by the Counsel for Trustees requires us to hold, that the legacies and annuities given to Mrs. Meredith and Mrs. Ewing and their respective children are *specific*. We cannot so understand the will.

It may be that Mr. McCredy supposed that the Delaware County property was ample security for the payment of the annuities and their principal. He appears to have placed a high estimate upon its value. But he likewise, no doubt, well knew of the fluctuations in the value of real estate, and especially of such as this. And he, therefore, no where in the will declares, intimates or hints, that the provisions made for his daughters and their children should be *confined* to Rockdale; and that if it proved insufficient, or should wholly fail, they should receive nothing. And the Law is averse to specific legacies and will not declare a legacy to be specific unless the will clearly requires such an interpretation. (1 Roper on Leg. 193* Note 1 and cases there cited, 2 Will. on Ex. 994*, 995*; Balliets' App. 2 Harris, 461; Walls *vs.* Stewart, 4 Harris, 281.)

Putting the value of Rockdale at $60,000 and the Norristown estate at $95,000, and cancelling the personal estate with the debts, then the Testator intended to give to his son as much as he gave to both of his daughters and their children, and fifty *per cent.* more, or three times as much as he gave to either of his daughters and their children. In addition to this he provided, that in case either of his daughters should die leaving no children, his son was to become the possessor of the principal of her annuity. Was it then unreasonable, or unnatural for him to provide, that

his son should have all of his estate of every description, *after* the payment of his debts and the annuities and legacies to his daughters and their children? Is not such a will, in view of the Testator's circumstances, his two daughters and one son, and the estimate he had of his whole estate, just such as a wise father would be expected to make?

The Auditor is of opinion, both from the plain reading of the will and the light thrown upon it by the text books and decided cases, that Bernard McCredy intended to charge all of his real estate with the payment of the annuities and legacies which he gave to Mrs. Meredith and Mrs. Ewing and their children, and that they are so charged thereby upon all of that real estate.

But, admitting that the annuities and legacies are charged upon all the real estate of the decedent by his will, it was objected by the Counsel for the Trustees, that there had been $18,014.94 of the *personal* estate in the hands of the Executor of Bernard McCrady, which ought to have been claimed and applied to the payment of these annuities and legacies, and to that extent the land must be exonerated.

It is unquestionably true, that even where legacies are distinctly charged upon real estate, the personalty is to be first applied in payment of a general or demonstrative legacy, unless there be a clear intent manifested to exonerate the personal estate. (1 Roper on Legacies 695*). But it is just as truly the Law, that the personalty must *first* of all be appropriated to the payment of debts. The evidence showed that the debts of the decedent exceeded in amount his whole personal estate, so that there was no personalty applicable to the payment of these annuities and legacies. The fact that the Auditor upon the account of the Executor of Bernard McCredy, awarded the balance in his hands

($18,014.94,) to the Executor (whether *qua* executor or as legatee) himself is wholly immaterial, for it is also one of the facts in evidence, that this very Executor did pay the whole of these debts, and, it is to be presumed, with this very balance, in part, as no creditors appeared before the auditor to make any claims.

This objection of the Trustees, if at all available, must rest upon the doctrine of equitable estoppels. It is because a wrong is done to the devisee of the land, in that he is compelled to pay so much more money than he would have been obliged to pay had the legatees made the proper claim upon the *primary* fund for payment, and thereby secured payment of their legacies out of the personalty *pro tanto,* that the legacies, as against the devisee of the land, must be considered as paid *pro tanto.* But no such wrong as this is done to the devisee of the land, when he gets *both* the land and this very residue of the personalty of whose non-application complaint is now made. This very sum of $18,014.94 was, by the auditor awarded to, and received by, Thomas McCredy himself, the devisee of this land; and his Trustees under his will can stand in no better or different position than he would occupy were he now alive and making this objection. Neither he nor his legatees and devisees—the objects of his bounty—have been injured. He got the money and the land. It is inequitable that he or his should have both. The case of Sergeant *vs.* Ewing, (12 Casey 162-3,) is directly in point.

But there is still another and equally conclusive answer to this position of the Trustees. At the time this personal estate was distributed, Thomas McCredy was himself the Executor of his Father's will and devisee in possession of his lands. As such Executor it was his duty, and one which he faithfully performed, to pay these annuities quarterly. He paid them in full. Neither Mrs. Meredith nor Mrs. Ewing had any right to demand from any one anything on account of their annuities, for no quarterly payment was then due. With the *principal* they had no concern. If it

was any one's duty to look after this principal, that rested upon Thomas McCredy, the Executor, himself—certainly not upon these Annuitants. He or his devisees cannot take advantage of his own wrong. (See Hanna's App. 7 Casey 57.) And they being still alive, their respective children had but *contingent* interest in the *principal* and were all minors and without guardians. How could these children make a claim? By what right? They might all die *before* their respective parent. And by whom? And how can the penalty of losing a part of, or their whole legacy, be visited upon minors for such alleged *laches* as this?

This objection of the Trustees, therefore, cannot be sustained.

The Annuities and Legacies being charges upon all of the real estate of Bernard McCredy, it is next to be considered, "Whether the sale of the Norristown property by the ex-"ecutors of Thomas McCredy, his devisee, discharged it from "the lien of the legacies and annuities?" Are they to be paid out of the proceeds of that sale?

It seems to be well settled in Pennsylvania, that sales of the real estate of a decedent by trustees or executors under powers conferred in the will for the payment of debts, partake of the nature of judicial sales, and discharge the land sold in the hands of the purchaser from the lien of the general or unscheduled debts of the testator—from the *statutory* lien of his debts. (Howell *vs.* Leacock, 2 Dall. 128; McCreery *vs.* Hamlin, 7 Barr. 87–88; Mitchell *vs.* Mitchell, 8 Barr, 126; Grant *vs.* Hook, 13 S. & R. 262; Cadbury *vs.* Duval, 10 Barr, 269; Helfrich *vs.* Obermeyer, 3 Harris 115; Fisher *vs.* Kurtz, 4 Casey 49–50.) But it is *not a judicial sale.* It is by virtue solely of a mere private power. In this latter case, where the power was expressly for the pay-

ment of debts, it was held, that the lien of a judgment obtained against the decedent in his lifetime was *not discharged by the sale.* But the purchaser, in order to avoid the necessity of seeing to the application of the purchase money, may, under the Act of 24th February, 1834, section 19, (Purd. Dig. 290, § 111,) pay the purchase money into Court, "to be disposed of according to the uses and trusts "contained in such will; and such payment shall be deemed "valid against all persons having, or who may have, an in-"terest therein."

In the present instance, the sale was not even for the payment of debts; but merely for the general interests of the trust estate created by Thomas McCredy's will. It was not a *judicial* sale and no liens were discharged by it. Liens existing upon the land at the time of the sale, can only be extinguished by *actual payment.* (Fisher *vs.* Kurtz, *supra.*) The land being sold and the money in the hands of the Trustees or of the Court, "to be disposed of according to the uses and trusts of the will," it is clearly to be applied to the payment of all claims existing against the trust property, which were due and payable at the time of the sale. The $33,333.33\frac{1}{3}$, which, as we have seen, were charged upon this real estate to meet the annuity of $2000 payable to Mrs. Meredith, became due and payable by the land or its owners on the 1st day of September, 1857, the day when she died. One third thereof vested *eo instanti* in each of her children then living; and the Administrator of Gertrude G. Meredith, one of these children, now deceased, appeared before the Auditor and claimed that her one-third of this principal sum should be awarded to him, and the arrears of interest due thereon; and the Guardians of the other two children who still survive, made a similar claim for the remaining two-thirds of the principal. It being once established that these legacies were liens upon the land sold at the time of the sale, then no one objected to these sums being awarded to the respective claimants.

The Auditor, therefore, awards to these Claimants their

respective proportions in full, together with the interest due thereon.

At the time of the sale there were no arrears due upon the annuity payable to Mrs. Ewing; and she is still alive, and, of course, the principal is not payable or demandable. No one appeared before the Auditor to make any demand for or to ask any action in reference to it. Under this state of facts, even if the sale and the payment of the money into Court had the same effect as a judicial sale, (which is granting them as great virtue as can be attributed to them,) the lien of the annuity and its principal would not have been discharged from the land sold, and could not be now paid out of the proceeds of the sale. They still remain as *continuing* liens charged upon the land in the hands of the purchaser (Fisher vs. Kurtz, *supra;* Mohler's Appeal, 5 Barr, 420, Dewalt's Appeal, 8 Harris, 239, and cases there cited *arguendo*). The last two cases cited are expressly in point: and, therefore, the sum charged upon the land to meet the provision for Mrs. Ewing and her children can not be paid out of this fund. The legacy is not due and payable—the time when it is payable is uncertain, as also are the persons to whom it is ultimately to be paid—they may not yet be in existence.

The residue of the fund for distribution the Auditor awards to Samuel H. Carpenter and Augustus Wilson, the Trustees named in the will of Thomas McCredy, to be held and invested by them for the uses and purposes expressed therein—no other person claiming or being entitled to the said residue, save as hereinbefore stated.

The Auditor gave written notice of the audit to A. V. Parsons, Esq., the Attorney for the purchasers of the Norristown real estate; but neither he nor his clients appeared before the Auditor.

Specific amounts have not been reported to the several parties, because, Exceptions having been filed, the interest must vary according to the time of actual payment

under the decree of this Court; and the fund itself is producing interest likewise.

The Auditor further reports, that he gave due notice of the time of filing his foregoing report in conformity with the rule of Court to all the parties in interest who appeared before him, as will be seen by reference to the annexed "Exhibit (F.)"

The only exceptions to the Report were those filed with the Auditor by Messrs. Guillou and Chapron on behalf of the Trustees under the will of Thomas McCredy, deceased, and which are hereto annexed, marked "Exhibit (G)."

The Auditor has re-examined the subjects to which these Exceptions apply; and, in his opinion, they are not well founded. He therefore reports no amendment of his Report.

It is proper, however, to remark, in regard to the fourth of these Exceptions, that the Auditor in his report does not state that the learned Counsel for the Trustees of Thomas McCredy, deceased, took the ground that the legacies and annuities to Bernard McCredy's children under his will were *specific*, but only that the ground which they did take was equivalent, and, if sustained, necessarily amounted to holding them to be specific.

GEO. JUNKIN, JR.

August 7th, 1863. *Auditor.*

EXHIBIT (E.)

Bernard McCredy's Will.

I, Bernard McCredy, of the City of Philadelphia, being of sound mind and memory, but mindful of the uncertainty of life, do hereby make and publish my last will and testament as follows, to wit:

In the first place, I direct all my just debts and funeral expenses to be paid and satisfied by my executor hereinafter named.

In the second place, I give and bequeath to my daughter Anna, the wife of Morris Meredith, the sum of two thousand dollars, to be paid to her annually, in equal quarterly payments, by my executor, during her natural life, for her sole and separate use, enjoyment, and behoof, free from the control, the debts, and any liability of, or on account of her present husband, or any future husband she may have, and her receipt for the same to be a sufficient discharge therefor.

In the third place, I give and bequeath unto my daughter Emeline Martha, wife of John Davis Ewing, the sum of two thousand dollars, to be paid to her annually, in equal quarterly payments, by my executor, during her natural life, for her sole and separate use, enjoyment, and behoof, free from the control, the debts, and any liability of, or on account of her present husband, or any future husband she may have, and her receipt for the same to be a sufficient discharge thereof.

In the fourth place, in order more effectually to secure the preceding legacies, I hereby charge upon my real estate, situate in the county of Delaware, and State of Pennsylvania, the sum of thirty-three thousand three hundred and thirty-three and one-third dollars ($33,333 33⅓), the interest thereof being the said sum of two thousand dollars, to be paid to my said daughter Anna, wife of Morris Meredith, annually, in equal quarterly payments, and upon

the death of my said daughter Anna, I give and bequeath the said principal sum to the children of my said daughter, share and share alike; and if any of the said children of my said daughter shall be dead, leaving children, such child or children to take the share which the parent would have taken.

In the fifth place, in order to secure more effectually the preceding legacies, I hereby also charge upon my real estate, situate in the county of Delaware, and State of Pennsylvania, the sum of thirty-three thousand three hundred and thirty-three and one-third dollars ($33,333 33⅓), the interest thereof being the said sum of two thousand dollars, to be paid to my said daughter Emeline Martha Ewing, wife of John Davis Ewing, annually, in equal quarterly payments, and upon the death of my said daughter Emeline, I give and bequeath the said principal sum to the children of my said daughter, share and share alike; and if any of the said children of my said daughter shall be dead, leaving children, such child or children to take the share which the parent would have taken.

In the sixth place, if either of my said daughters shall die, leaving no child or children, or the descendants of a child, or of children, I give and bequeath the said principal to my son Thomas and his heirs.

In the seventh place, after the payment of my just debts and securing the payment of the sums aforesaid annually to my said daughters, and the principal hereby given to their children and their descendants, upon their death, as to all the rest and residue of my estate, real, personal, and mixed, and wheresoever the same may be situated, I give, devise, and bequeath the same to my son Thomas McCredy and his heirs and assigns.

I hereby appoint my said son Thomas McCredy the sole executor of this my last will and testament.

In witness whereof, I, the said Bernard McCredy, the testator above named, have hereunto set my hand this

thirteenth day of May, in the year of our Lord one thousand eight hundred and fifty-four.

B. McCREDY.

Signed, published, and declared by the above named Bernard McCredy, as and for his last will and testament, in the presence of us, who, at his request, have signed as witnesses to the same.

GARRICK MALLORY,
CHARLES KELLEY,
FURMAN SHEPPARD.

EXHIBIT "G."

EXCEPTIONS OF TRUSTEES UNDER THOMAS McCREDY'S WILL.

Orphans' Court, Philadelphia County,
Estate of Thomas McCredy, dec'd.

Sur report of Auditor on the distribution of balance of proceeds of sale of the real estate of said decedent, at Norristown, which has been paid into Court.

Exceptions by Samuel H. Carpenter and Dr. Augustus Wilson, Trustees of the Estate of Thomas McCredy, dec'd, to the report of George Junkin, Jr., Esq., Auditor.

First.—That the Auditor has erred, in deciding, that Bernard McCredy intended to charge all of his real estate with the payment of the annuities and legacies, which he gave to Mrs. Meredith and Mrs. Ewing and their children; and that they are so charged thereby upon all of that real estate.

Second.—That the Auditor has erred, in considering any evidence whatever, relating to the value of the Rockdale property, except as to the Testator's estimate thereof.

Third.—That the Auditor has erred, in not awarding the balance of the fund for distribution, after the payment of the amount due on the mortgage held by the Montgomery County Bank, to the Trustees of Thomas McCredy's estate.

Fourth.—That the Auditor has erred, in reporting that the ground taken by the Trustees, is, that the legacies to Testator's children under Bernard McCredy's will are specific, their ground being, that in the present condition of the estate, and after the proceedings in the Orphans' Court on the settlement of the account of Thomas McCredy, Executor of the estate of Bernard McCredy, deceased, the said legacies are payable out of the Rockdale property only.

Fifth.—That the Auditor has erred in deciding that the sale of the Norristown property by the Executors of Thomas McCredy's estate, and the payment of the purchase money into Court, under the provisions of the Act of 24th February, 1834, Section 19, did not discharge the property sold, from the liens of the annuities and legacies under Bernard McCredy's will.

CONSTANT GUILLOU,
JOHN B. CHAPRON,

For the Trustees of Thomas McCredy's estate.

July 20th, 1863.

EXHIBIT (A).

COUNTY OF PHILADELPHIA, *ss.*

[SEAL.] I certify, that at an Orphans' Court, for the county aforesaid, held at Philadelphia, on the seventeenth day of April, A. D. one thousand eight hundred and sixty-three, before the Honorable Oswald Thompson, President, and his Associate Justices of said Court, in the matter of the estate of Thomas McCredy, deceased, on motion of John B. Chapron, Esq., for the execu-

tors of the estate of Thomas McCredy, deceased, the Court appointed George Junkin, Jr., Esq., auditor to report distribution of the balance ($66,666.66) of proceeds of sale of real estate at Norristown, which has been paid into Court.

Witness my hand and the seal of the said Court, this twenty-first day of April, A. D. one thousand eight hundred and sixty-three.

A. J. FORTIN,
Pro Clerk of the Orphans' Court.

EXHIBIT (B).

In the Orphans' Court for the City and County of Philadelphia.—Estate of Thomas McCredy, dec'd.—The Auditor appointed by the Court to report distribution of the balance of the proceeds of the sale of the real estate of said decedent at Norristown, which has been paid into Court, will meet the parties in interest at his office, S. E. cor. of Sixth and Walnut Sts., Philadelphia, on Monday, May 4th, 1863, at 4 o'clock, P. M.

GEO. JUNKIN, Jr., *Auditor.*

—["*The Legal Intelligencer.*"

EXHIBIT (C).

In the Orphans' Court for the City and County of Philadelphia.—Estate of Thomas McCredy, deceased.—The Auditor appointed by the Court to report distribution of the balance of the proceeds of the sale of the real estate of decedent at Norristown, which has been paid into Court, will meet the parties in interest at his office, S. E. cor. Sixth and Walnut streets, Philadelphia, on Monday, May 4th, 1863, at 4 o'clock, P. M.

GEO. JUNKIN, Jr., *Auditor.*

—["*The Philadelphia Inquirer.*"

EXHIBIT (D).

George Junkin, Jr., being duly sworn according to law, says he will perform the duty of the above appointment with fidelity.

GEO. JUNKIN, Jr.

Sworn and subscribed before me, this
24th day of April, A. D. 1863.

A. J. Fortin,
Pro Clerk of Orphans' Court.

EXHIBIT "F."

Estate of Thomas McCredy, deceased. Sur distribution of proceeds of sale of decedent's real estate.

Please take notice that my report as Auditor in the above matter will be filed in the office of the Clerk of the Orphans' Court, on Friday, August 7th, 1863. Meanwhile you can have access to the same at my office, S. E. corner of Walnut and Sixth streets, in the city of Philadelphia.

I am, yours respectfully,

GEO. JUNKIN, Jr.,
Auditor.

July 10*th*, 1863.

We acknowledge the receipt of the above notice agreeably to the rule of Court.

CONSTANT GUILLOU,
JOHN B. CHAPRON,
For the Executors and Trustees of the Estate of Thomas McCredy, dec'd.

WM. F. JUDSON,
Attorney for Penn Co. for Insurance on Lives, etc.,
Guardian of Anna S. and Wm. Meredith.

P. McCALL,
Attorney for Morris Meredith, administrator,
and Mrs. Emeline Martha Ewing.